

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID T. CAPPS and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

*Docket No. 96-484; Submitted on the Record;
Issued January 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant is entitled to a schedule award as a result of an employment-related shoulder or thoracic spine fractures on May 24, 1993.

The Board has duly reviewed the record in the present appeal and finds that appellant is not entitled to a schedule award as a result of his employment-related shoulder or thoracic spine fractures on May 24, 1993.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing federal regulations² set forth the number of weeks of compensation to be paid for permanent loss of the member, functions, and organs of the body listed in the schedule. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.³ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, or for the whole person,⁴ no claimant is entitled to such an award.⁵ However, amendments to the Act in 1960 modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originates in a scheduled or nonscheduled member. As the schedule award provisions of the Act

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.304.

³ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁴ *Gary L. Loser*, 38 ECAB 673 (1987).

⁵ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.⁶ The Act does not specify the manner in which the percentage of loss of a member shall be determined and the method for making such a determination rests in the sound discretion of the Office of Workers' Compensation Programs.⁷ The Office has adopted, and the Board has approved, the use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁸

On May 24, 1993 appellant, then a 52-year-old boilermaker foreman, sustained lacerations to the head, a broken collar bone, and fractured back vertebrae, from a strike of a pipe link which fell on him which caused him to lose consciousness.⁹ Appellant stopped work on the date of injury and was treated with sutures for his scalp laceration. Under the care of Dr. Thomas Markham, a Board-certified orthopedic surgeon, appellant underwent diagnostic testing which revealed two fractures of the thoracic spine and was provided a back brace along with physical therapy treatment. Three months after the injury, he returned to work with restrictions on lifting above his shoulder or lifting more than 20 pounds, and restrictions against using a ladder. Appellant complained however of continued right shoulder pain and upon evaluation September 13, 1993, Dr. Markham noted a loss of rotation with no instability or evidence of rotator cuff impingement or a tear. One month later Dr. Markham reported normal range of motion of the shoulder and mild positive impingement testing. Following diagnostic tests which revealed acromioclavicular joint changes and some tendinitis, he referred appellant to Dr. John J. Schaeffer, a Board-certified orthopedic specialist.¹⁰ Appellant was referred further to Dr. Agnes Moon, a Board-certified physiatrist, who provided injection treatment every six weeks for the continued complaints of "nagging pain" behind the shoulder blade and soreness of the shoulder. Dr. Moon diagnosed mid-back pain due to chronic myofascial pain syndrome due to appellant's injury. Dr. Alan F. Doyle, a physiatrist associated with Dr. Moon, began treating appellant in August 1994 and later reported that appellant retired.

On August 24, 1995 appellant filed a claim for a schedule award for permanent impairment. He submitted reports dated March 8 and May 31, 1995, by Dr. John Dobson, a Board-certified orthopedic surgeon, who supported appellant's claim for permanent impairment of the back. Dr. Dobson provided a history of appellant's condition since his injury and noted that appellant's mid-back pain had not improved. He reported that the mid-back pain, located below the tips of the scapular, was chronic in nature, and made worse by physical activities

⁶ *Rozella L. Skinner*, 37 ECAB 398 (1986).

⁷ *See Richard W. Robinson*, 39 ECAB 484 (1988).

⁸ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (hereinafter A.M.A., *Guides*).

⁹ Appellant was diagnosed with a fracture of the right clavicle and a thoracic spine fracture at T5 and T6, without nerve root impingement.

¹⁰ X-rays on October 15, 1993 showed a well-healed clavicle while a magnetic resonance imaging (MRI) scan on October 25, 1993 revealed tendinitis in the supraspinatus tendon without evidence of a full thickness tear, in addition to marked acromioclavicular joint changes.

involving the upper extremity and overhead lifting, with progressive symptoms during the day into the evening. Dr. Dobson reported no major radiation of pain passed the shoulder into the upper extremities and rated appellant's impairment at 15 percent.

The Office advised appellant by letter dated August 30, 1995 that impairments for the spine without impairment to the extremity was not compensable under the schedule provisions, and that impairment to the whole person was not compensable as well. In response, appellant submitted a September 19, 1995 report from Dr. Dobson, who rated appellant's impairment at 15 percent of his whole person according to the spine tables within the most recent edition of the A.M.A., *Guides*. By decision dated October 23, 1995, the Office denied appellant's claim for a schedule award for permanent impairment due to his thoracic and scapular fractures, based on the lack of permanent impairment to the upper extremities.

The Board notes that the Office correctly found a lack of a basis for a schedule award, as the spine is specifically excluded from the schedule, and the clavicle is not part of the schedule. As the extremities are scheduled members, the Office correctly advised appellant of the need for his physician to address any impairment of the extremities. In his September 19, 1995 report, Dr. Dobson specifically stated that the impairment rating was not based on impairment to the extremities but solely on the impairment of the spine, as provided under the 4th edition of the A.M.A., *Guides*. While the Office has adopted the A.M.A., *Guides*, the use of the A.M.A., *Guides* is limited to the coverage permitted by the Act and regulations under the Act. Since spinal conditions, other than impairment of the extremities is not covered, the Office properly found appellant not entitled to a schedule award for his continued right mid-back or scapula pain.

The decision of the Office of Workers' Compensation Programs dated October 23, 1995 is hereby affirmed.¹¹

Dated, Washington, D.C.
January 7, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ The Board has jurisdiction to review only the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, has no jurisdiction to review the additional report dated November 10, 1995 from Dr. Dobson.